No. 88-1835

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In The

Supreme Court of the United States

October Term, 1988

THE STATE OF FLORIDA,

Petitioner,

vs.

MARTIN LESLIE WELLS,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Florida

RESPONDENT'S BRIEF ON THE MERITS

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QUESTION PRESENTED (RESTATED)

WHETHER THE SEARCH OF A CLOSED CONTAINER FOUND DURING A VEHICLE INVENTORY SEARCH CONDUCTED ACCORDING TO AGENCY PROCEDURES WHICH DO NOT MANDATE OPENING CLOSED CONTAINERS IS CONSISTENT WITH THE FOURTH AMENDMENT GUARANTEE AGAINST UNREASONABLE SEARCHES?

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STATEMENT OF THE CASE

A careful reading of the joint appendix reveals considerable detail concerning the circumstances of the automobile search. After observing the cash on the floorboard of the car driven by Mr. Wells, Trooper Adams recalled, "I . . . shined my light throughout the vehicle to see if there was anything else, as far as any other contraband other than the money." (JA. 204). Adams admitted, "My curiosity was aroused . . . ." (JA. 61).

Trooper Adams then radioed his supervisor to inquire about conducting an inventory search and the significance of the cash found in the car. (JA. 88, 207-208). The supervisor stated, "Anybody can have three thousand dollars on the floor of their car." (JA. 88). Adams proceeded to impound the vehicle, having been advised that the presence of the money was essentially irrelevant. (JA. 208).

K&S Automotive towed the vehicle driven by Mr. Wells to their fenced, guarded facility. (JA. 139 - 140). Trooper Adams arrived at K&S Automotive at approximately 1:30 a.m. to further inventory the car. (JA. 140). Adams sought the assistance of two K&S Automotive employees, Grover Bryan and William Kennedy. (JA. 141, 172). The three men began to search the vehicle, guided by Trooper Adams.

Mr. Bryan recalled, "Officer Adams said he wanted to inventory the car good, he wanted to go through it real good because he felt there was drugs in it." (JA. 141). A search of the car's passenger compartment revealed two marijuana cigarette butts in the ashtray. (JA. 141).

When asked about Trooper Adams' demeanor upon finding the contraband, Mr. Bryan noted, " . . . he kept saying there was more somewhere." (JA. 141). Adams then mentioned the cash previously found in the car and told Mr. Bryan, "There ain't nobody runs around with that kind of money in the floorboard unless they're dealings drugs or something like that." (JA. 142).

Having completed the search of the passenger compartment, Trooper Adams directed the search to the vehicle's trunk. (JA. 143). Tho only item found in the trunk was a locked suitcase. (JA. 144). Mr. Bryan commented on Trooper Adams' attitude upon finding the suitcase, " . . . he persisted we need to open that suitcase and find out what was in it." (JA. 144). Adams related that he had a strong suspicion there were drugs in the car and that they were probably contained in the suitcase. (JA. 145). Trooper Adams then directed that Bryan and Kennedy use their knives to pry open the suitcase. (JA. 146).

Responding to questions about a search warrant for the vehicle at this point, Trooper Adams replied, "Well, at this time I thought that would be appropriate – a search warrant would be appropriate, but based on what we had and it was part of the search – I figured it was part of the search, I didn't see where it need be." (JA. 82). When asked about the scope of an inventory search including prying open a locked suitcase with knives, Adams stated, "Well, I had to take my chances." (JA. 83).

William Kennedy and Grover Bryan pryed the case for about ten minutes before it opened. (JA. 147). The opened suitcase revealed a package wrapped in a plastic garbage bag. (JA. 147). Mr. Bryan noted Troopers Adams'

excited utterance, "There it is." (JA. 147). Trooper Adams then tore open the plastic covered package and discovered the marijuana. (JA. 97, 147 – 148, 177).

SUMMARY OF ARGUMENT

Under *Colorado v. Bertine*, 479 U.S. 367 (1987), a constitutional vehicle inventory search is conducted in good faith and not motivated by suspicion of criminal activity. The inventory search of the car driven by Mr. Wells escalated to an investigatory search seeking evidence of a drug deal. Since the inventory search served as a ruse to conduct an investigatory search, Trooper Adams' conduct violated Respondent's fourth amendment rights.

The Florida Highway Patrol's procedures are silent regarding closed containers found during inventory searches. The *South Dakota v. Opperman*, 428 U.S. 364 (1976), line of cases emphasize that to pass constitutional muster, inventories must be conducted according to standardized criteria. Since the Florida Highway Patrol's procedures fail to mention closed containers, no standard criteria exists. Thus, the inventory search which included prying open a locked suitcase violated the fourth amendment teachings of *Opperman* and its progeny.

Vehicle inventory searches are a valid exception to the warrant requirement if conducted to protect owner's property, to protect the police from spurious claims of lost property, and to guard against hidden dangers. *Bertine* reiterates that vehicle inventory searches must adhere to standardized criteria.

Vehicle inventory searches are reasonable if their scope is that minimum level of intrusion necessary to satisfy the *Opperman* justifications. Further, such searches must not be motivated by criminal suspicion.

The scope of the inventory search conducted by Trooper Adams was unreasonable. The scope exceeded the level of intrusion necessary to satisfy the *Opperman* justifications. Breaching a locked container is inconsistent with the notion of protecting an owner's property. Returning unlocked or broken containers to property owners will only aggravate the problem with spurious claims of lost or stolen property. The joint appendix contains no testimony that Adams pryed open the container for safety concerns. In fact, the very act of prying open the container evinces a lack of concern of hidden dangers.

Adams should have inventoried the suitcase as "one locked container used to carry personal effects". The property within the locked case could have been securely stored in the vehicle's trunk within the fenced, guarded facility where the inventory occurred. Further, preserving the integrity of the locked suitcase would minimize claims of lost or stolen property.

Exigencies of law enforcement require that police have discretion when performing their duties to protect themselves and the public. For vehicle inventory searches, discretion must be narrowly tailored to effectively proscribe intrusions founded upon investigatory motives. The exercise of discretion may not exceed the bounds of the *Opperman* justifications. Adams' search of the suitcase may only be characterized as unreasonable

since the intrusion exceeded the scope allowed by *Opperman*. The heightened expectation of privacy in personal luggage supports this conclusion.

The general guidelines of the Florida Highway Patrol vest searching officers with an unconstitutional quantum of discretion. Trooper Adams was free to open some containers and not others. This is precisely the sort of arbitrary intrusion the fourth amendment guards against.

The Supreme Court of Florida properly held that inventory procedures must address closed containers and be reasonable. In the absence of a procedure or standardized criteria required by *Bertine*, the search of the vehicle driven by Mr. Wells was unreasonable.

In the instant case the inventory search escalated to an investigatory search based on criminal suspicion. Petitioner concedes that Adams had probable cause to search the locked suitcase. Petitioner admits that Adams felt the case contained either weapons or money from a drug deal.

The Florida Highway Patrol had exclusive control of the suitcase and in the absence of any exigency, the fourth amendment principles of *U.S. v. Chadwick*, 433 U.S. 1 (1977), and *Arkansas v. Sanders*, 442 U.S. 753 (1979), require a warrant to search the container. Since no threat of losing evidence existed and the joint appendix reveals that the case posed no danger to Adams or the search party, the authority to search the locked suitcase may only come from a detached, neutral magistrate.

INTRODUCTION

The fourth amendment permits warrantless vehicle searches in a few, carefully defined circumstances. Impending danger, or the threat of losing evidence are the type of exigencies which permit warrantless searches. Further, administrative procedures such as inventory searches conducted according to standard criteria are consistent with the fourth amendment. However, in the absence of an exigency, the automobile exception to the warrant requirement evaporates.

Petitioner urges that the scope of a vehicle inventory search is properly determined by the searching officer trying to satisfy government interests. The argument makes the inventory search itself an exigency, justifying a warrantless vehicle search to satisfy the *Opperman* justifications. In the instant case, Petitioner claims that Trooper Adams had to pry open the locked suitcase to ensure he satisfied government needs.

Absent exigent circumstances, once the police have exclusive control of the property to be searched, a warrant is required. However, Petitioner's argument permits law enforcement officers to determine the scope of an inventory search based on the need to protect property, prevent false claims, and to protect himself. If an officer feels that a locked suitcase must be pryed open to satisfy *Opperman*, Petitioner asserts that such action is consistent with fourth amendment principles.

By treating the *Opperman* justifications as exigencies which permit warrantless searches of locked suitcases, Petitioner's position greatly undermines the fourth amendment protection of one's vehicle and its contents.

As long as the search is labeled an "inventory", officers may search vehicles and their contents in a fashion for which the fourth amendment traditionally requires a warrant. All impounded vehicles may be subjected to complete, detailed searches without probable cause.

Sustaining Petitioner's contentions effectively nullifies the fourth amendment principles of *Chadwick* and *Sanders*. Under the *Opperman* "exigencies", even after the property to be searched is in the exclusive control of the police, locked suitcases found in vehicles may be searched without a warrant.

In reviewing the record and briefs before this Court, Respondent would stress that what occurred in this case involved nothing more than a pretext search. By pretext search Respondent includes "searches or seizures that are undertaken by law enforcement officers for reasons that do not constitute a proper legal justification for such activity." See Burkoff, *Bad Faith Searches*, 47 N.Y.U. L. Rev. 70, 71 N.5 (1982) quoted in Burkoff, *The Pretext Search Doctrine Returns After Never Leaving*, 66 U. Det. L. Rev. 363, 364 (1989). To date this Court has recognized that the fourth amendment has been compromised, as in this case, when two elements coalesce: first, when it is found to be clear that the government seized evidence on the basis of pretext even though the government's agents could have acted lawfully, and second, when an improper motivation is discovered. From this perspective, the obvious case for concern for Petitioner is *Colorado v. Bertine, supra*. In *Bertine* as Respondent will develop *infra*, this court reaffirmed the appropriateness of an in-depth factual case-by-case analysis in order to determine pretext. In fact in *Bertine* this Court after finding the inventory search of

Bertine's van and its contents constitutional, stressed the fact that there was no evidence on the record of pretext and hence any linkage of pretext with inventory searches generally was disavowed. "In the present case, as in *Opperman* and *Lafayette*, there was no showing that the police, who were following standardized procedures, acted in bad faith or for the sole purpose of investigation." 479 U.S. 367, 372 (1987) (citations omitted). This critical point has been ignored by Petitioner in its search for a bridge to connect its pretext search with an inventory search. Petitioner's failure to bridge the acceptable with the unconstitutional results in *Bertine* being distinguished from the present case and places the present case within the same posture as *Missouri v. Blair*, 474 U.S. 1049 (1986) *cert.* dismissed 480 U.S. 689 (1987).

The first of Petitioner's bridges too far is this Court's ruling in *Bertine* that suspicionless inventory searches of the contents of vehicles are constitutional when explicitly conditioned upon the finding that there was *no* evidence that the police officers were *not* making precisely what the search purported to be, namely, an inventory (not an investigative) search. Following *Bertine*, a defendant could demonstrate that a search was not in fact an inventory, *i.e.*, that it was pretextual, by making a showing that the police failed to follow "standardized procedures" or "acted in bad faith or for the sole purpose of investigation." *Id.* It is important to note that standardized procedures were not followed in the present case any more than were followed in *Blair*.

The second bridge too far for Petitioner is *Maryland v. Garrison*, 480 U.S. 79 (1987) wherein this Court held the

search and seizure constitutional because, although mistaken about whose premises they were searching, the executing officers:

> [P]erceived McWebb's apartment and the third floor premises as one and the same; therefore their execution of the warrant reasonably included the entire third floor . . . [since] the officers' conduct was consistent with a reasonable effort to ascertain and identify the place intended to be searched within the meaning of the Fourth Amendment. *Id.* at 88-89 (citations omitted).

The reasonableness of the executing officers' mistake about the apartment they were in was critical to the holding. The Court emphasized that the officers' belief that they were in McWebb's apartment was a reasonable one given the physical configuration of the floor:

> [T]he validity of the search of [Garrison's] apartment pursuant to a warrant authorizing the search of the entire third floor depends on whether the officers' failure to realize the overbreadth of the warrant was objectively understandable and reasonable. Here it unquestionably was. The objective facts available to the officers at the time suggested no distinction between McWebb's apartment and the third-floor premises. *Id.*

In essence, the rule that this Court has adopted to govern when mistaken searches are constitutional has been ignored by Petitioner and that is: has there been a reasonable and honest good faith effort on the part of the officer. Without that bridge the officer has gone too far. Such is the posture of the present case.

ARGUMENT

I. WHEN A LAW ENFORCEMENT AGENCY MAINTAINS PROCEDURES TO INVENTORY THE CONTENTS OF IMPOUNDED VEHICLES AND THOSE PROCEDURES DO NOT MANDATE OPENING CLOSED CONTAINERS, AN INVENTORY SEARCH OF SUCH A CLOSED CONTAINER VIOLATES THE FOURTH AMENDMENT GUARANTEE AGAINST UNREASONABLE SEARCHES.

A. THE SCOPE OF A VEHICLE INVENTORY SEARCH WILL CONSTITUTIONALLY INCLUDE OPENING CLOSED CONTAINERS IF REASONABLE LAW ENFORCEMENT AGENCY PROCEDURES REQUIRE SUCH ACTION IN EACH CASE.

In 1985, Trooper Rodney Adams of the Florida Highway Patrol arrested Respondent, Martin Leslie Wells, for driving under the influence of alcohol. (JA. 281). At the time of the arrest, Trooper Adams discovered a substantial amount of currency in the car driven by Respondent. (JA. 59-60). Adams consulted his supervisor and then impounded the vehicle. (JA. 88, 208). Later that evening, Trooper Adams inventoried the impounded car, which included prying open a locked suitcase found in the trunk. (JA. 282).

Petitioner argues that *Colorado v. Bertine*, 479 U.S. 367 permits the exercise of police discretion for inventory searches unless the searching officer is suspicious of criminal activity and uses his discretion to search for evidence. *Id.*, 479 U.S. at 375. Petitioner cites *Bertine*, as the Court discusses the constitutionality of the decision to impound the vehicle:

> Nothing in Opperman or Lafayette prohibits the exercise of police discretion so long as that discretion is exercised according to standard criteria and on the basis of something other than suspicion of evidence of criminal activity. Here, the discretion afforded the Boulder Police was exercised in light of standardized criteria, related to the feasibility and appropriateness of parking and locking a vehicle rather than impounding it. There was no showing that the police chose to impound Bertine's van in order to investigate suspected criminal activity. *Bertine*, 479 U.S. at 375, 107 S.Ct. at 743, 93 L.Ed. 2d at 748 (Footnote omitted).

The Florida Highway Patrol's *Forms and Procedures Manual* fails to address how to handle closed containers found during an inventory search. (JA. 288-294). No standard criteria exits.[1] *Id*. When Trooper Adams pryed open the locked suitcase, he used his discretion to determine the scope of the search. Thus, whether Adams' conduct comports with the fourth amendment depends, in part, on his motive. *Bertine*, 479 U.S. at 375.

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[1] *See Johnson v. State*, 764 P.2d 530 (Okl.Cr.1988), as the court notes with approval the standard criteria:

> 3. All areas of the vehicle must be inventoried, glove compartment, luggage compartment, etc., provided entry can be gained without forcing locks.
>
> 4. Items of personal property inside the vehicle that are locked separately, such as luggage, tool boxes, etc., shall not be entered without proper authority. *Id*. at 534.

(Continued on following page)

(Footnote omitted). Under the rationale of *Bertine*, Adams must have searched the car in good faith, not seeking to discover evidence of a crime to satisfy the fourth amendment. *Id.*

The joint appendix contains useful testimony to evaluate Trooper Adams' motivation to pry open the case in the absence of agency guidelines. Grover Bryan, who assisted Adams in the search, recalled that before the search began, Trooper Adams was suspicious and felt they would find drugs in the car. (JA. 141). Once the search uncovered the marijuana cigarette butts, Trooper Adams told Mr. Bryan about the currency found earlier and declared, "There ain't nobody runs around with that kind of money in the floorboard unless they're dealing drugs or something like that." (JA. 142). When the search party found the locked suitcase, Trooper Adams reiterated his feeling that drugs would be found, suggesting they were probably in the case. (JA. 145).

As the search began, Trooper Adams stated that he was suspicious of criminal activity. (JA. 141) During the

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See Commonwealth v. Martinson, 533 A.2d 750 (Pa.Super.1987), *appeal docketed*, No. 123 E.D. (Pa. Sept. 7, 1988), noting the Philadelphia Police Department's standard criteria:

> (1) Remove all personal property from the vehicle and place it in a police vehicle for safekeeping.
>
> (a) The officer will not force a lock off the compartment or trunk, but will note on the Property Receipt that either or both were locked. *Id.* at 753.

search, the rookie officer became excited and his statements unequivocally evince suspicion of a drug related crime. (JA. 141, 142, 145, 147). The scope of the search progressed in accord with Trooper Adams' motive to investigate. The purported "inventory search" escalated to a warrantless intrusion unreasonably rifling a locked container typically used to secure personal effects.

Assuming, *arguendo*, that the Florida Highway Patrol's inventory search procedures are a sufficient standardized criteria to constitutionally guide officers, Trooper Adams' exercise of discretion violates the fourth amendment under the rationale of *Bertine*. 479 U.S. at 375. Adams searched the vehicle without a warrant seeking to discover evidence of a crime. *Id.* Trooper Adams thus acted in bad faith violating the principles of *Opperman* and its progeny.

In *Colorado v. Bertine*, this Court held that, "reasonable police regulations relating to inventory procedures administered in good faith satisfy the fourth amendment, even though courts might, as a matter of hindsight, be able to devise equally reasonable rules requiring a different procedure." *Id.* 479 U.S. at 374. The holding is appended by footnote 6, citing *Illinois v. Lafayette*, 462 U.S. 640 (1983), and *South Dakota v. Opperman*, 428 U.S. 364, stating:

> We emphasize that, in this case, the trial court found that the police department's procedures mandated the opening of closed containers and the listing of their contents. Our decisions have always adhered to the requirement that inventories be conducted according to standardized criteria. *Id.* 479 U.S. at 374, 107 S.Ct. at 742, 93 L.Ed.2d at 747.

Bertine requires that inventory searches be reasonable, be in accord with a standardized criteria and be administered in good faith. *Id.* The Supreme Court of Florida interprets "standardized criteria" to require inventory procedures which mandate either opening all containers or none of them.[2] (JA. 256). Petitioner asserts that this view is, "an overly-restrictive misapplication of the law to the facts." (Petitioner's *BRIEF ON THE MERITS*, hereinafter 'Brief', at 11).

Bertine mandates that inventory procedures vest searching officers with limited discretion to ensure inventory searches are consistent with fourth amendment principles concerning warrantless searches. *Bertine*, 479 U.S. at 375. Warrantless searches are justified by the presence of exigent circumstances or standardized criteria to ensure fourth amendment principles are respected. *Terry v. Ohio*, 392 U.S. 1, at 22 (1968). *Delaware v. Prouse*, 440 U.S. 648, at 654-655 (1979). *Cady v. Dombrowski*, 413 U.S. 433, at 443 (1973). *Carroll v. U.S.*, 267 U.S. 132 (1925). *South Dakota v. Opperman*, 428 U.S. 364. *Bertine* precludes the exercise of police discretion based upon criminal suspicion during vehicle inventory searches. *Bertine*, 479 U.S. at 375. The evidentiary discretion denounced in *Bertine* relates to the decision to impound a vehicle and the procedures prescribing the scope of an inventory search. *Id.* 479 U.S. at 374-376.

Florida Highway Patrol's procedures required that all impounded vehicles be subject to an inventory search.

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[2] At least one other state court reads *Bertine* this way, *State v. Shamblin*, 763 P.2d 425 (Utah App. 1988).

(JA. 288). Petitioner asserts that alone, this instruction is sufficient to proscribe the evidentiary discretion denounced in *Bertine*. (Brief at 11-12). The procedures reveal nothing concerning the scope of an inventory search or in what fashion one is to be conducted. *Id.* The only guidance afforded officers is found in section 16.02.00 'Instructions for Completing the Inventory and Vehicle Storage Receipt.' (JA. 289-291). Instruction number 18 states:

> 18. List Property in Vehicle-Inventory of all articles in the vehicle should be shown such as articles of clothing, equipment, and tools. (JA. 290).

Petitioner submits that the instruction noted above is a sufficient standardized criteria to constitutionally permit prying open a locked suitcase during an automobile inventory search. (Brief at 12).

Bertine requires that a standardized criteria exists to guide inventories, and that this criteria be adhered to. *Bertine*, 479 U.S. at 375. For Adams' conduct to pass constitutional muster, he must have followed the Florida Highway Patrol's procedures. *Id.* Chapter 16 of the manual provides that searching officers must complete several property receipt forms to ensure the *Opperman* interests are satisfied. (JA. 288-294). However, the record in the instant case contains no evidence that Adams completed the required forms. Adams thus failed to satisfy the Florida Highway Patrol's standard procedures for vehicle inventory searches.

The Florida Highway Patrol's procedures lack the requisite specificity to constitutionally permit opening closed containers. No policy exists to guide the searching officer regarding closed containers. Inventories must adhere to standard criteria to preclude arbitrary encroachment upon fourth amendment rights. *Bertine*, 479 U.S. at 374-375. Curious about the currency and marijuana remnants in the ashtray, Adams elected to pry open the suitcase seeking evidence of a drug deal. (JA. 141, 142, 145). Since agency guidelines ignored closed containers, Trooper Adams was free to open some containers and not others.[3] Such an exercise of discretion contravenes the fourth amendment principles of *Bertine*. *Bertine*, 479 U.S. at 375. Under the *Opperman* line of cases, inventory procedures must articulate standards to guide officers in a constitutionally permissible fashion. *Opperman*, 428 U.S. at 372. *Lafayette*, 462 U.S. at 648. This Court has long recognized the need for standard procedures to guide police conducting searches emphasizing the, " . . .- limited time and expertise to reflect on and balance the social and individual interests involved." *New York v. Belton*, 453 U.S. 454 at 458 (1981).

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[3] In *State v. Shamblin*, the Court of Appeals of Utah noted that such discretion is inconsistent with the teachings of *Bertine*. *Id.* at 428.

B. THE SCOPE OF A CONSTITUTIONAL INVENTORY SEARCH IS BASED ON ARTICULATED, SPECIFIC PROCEDURES TO ENSURE THE SEARCHING OFFICER SEARCHES EACH CAR IN THE SAME, MINIMALLY INTRUSIVE FASHION NECESSARY TO SATISFY THE *OPPERMAN* JUSTIFICATIONS.

In *South Dakota v. Opperman*, 428 U.S. 364, this Court first recognized vehicle inventory searches as a valid exception to the warrant requirement. *Opperman* permits law enforcement agencies to inventory the contents of impounded vehicles if conducted according to standard police procedures. *Opperman*, 428 U.S. at 372. The Court articulated three situations where government interests outweighed an individual's fourth amendment rights: protecting the owner's property in police custody, protecting the police against claims of lost or stolen property, and protecting the police from danger. *Id.* 428 U.S. at 369.

Colorado v. Bertine further defined the requirements of a constitutional inventory search. The Court held that reasonable police procedures for automobile inventory searches administered in good faith satisfied constitutional standards. *Bertine*, 479 U.S. at 374. The Court emphasized that inventories must be conducted according to standardized criteria. *Id.* n.6. As an example of a standardized criteria, the Court noted that Boulder Police procedures mandated opening all closed containers found during automobile inventory searches. *Id.*

Petitioner asserts that inventory searches are reasonable under the fourth amendment if agency guidelines satisfy the *Opperman* justifications. (Brief at 13). Petitioner claims that inventory searches are only unreasonable if

used as a ruse to conduct an investigatory search. *Id.* Petitioner urges that the constitutionality or reasonableness of an inventory search must be an ad hoc determination based on an objective standard. *Id.* The argument concludes that without the discretion to determine the scope of an inventory search, officers cannot ensure the search will be reasonable. *Id.*

This Court has long noted the basic purpose of the fourth amendment is, "to safeguard the privacy and security of individuals against arbitrary invasions by government officials." *Camara v. Municipal Court*, 387 U.S. 523, at 528 (1967). Quoting *Camara*, the Court reiterated the need to impose a standard of reasonableness to control the exercise of discretion by law enforcement agents. *Delaware v. Prouse*, 440 U.S. 648, at 654 (1979). The reasonableness of a particular police procedure is determined by balancing its intrusion on an individual's fourth amendment rights versus the importance of government interests advanced by the procedure.[4] *Id.*

Citing *Delaware v. Prouse*, Petitioner notes that, " . . . the reasonableness standard usually requires at a minimum, that the facts upon which an intrusion is based be capable of measurement against an objective standard . . . " (Brief at 14). In *Prouse*, the Court noted that probable cause provided such a standard against which police conduct may be assessed. 440 U.S. at 654. Since the *Opperman* justifications focus on the government interests

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[4] *See State v. Flittie*, 425 N.W. 2d 1 (S.D. 1988), as the Supreme Court of South Dakota discusses the reasonableness requirement under *Opperman* and its progeny.

served by inventory searches, the *Opperman* interests provide a suitable objective standard to assess the constitutionality of an inventory search. Under the *Opperman* line of cases, the constitutional boundary for the scope of vehicle inventory search is that level of intrusion necessary to protect personalty within the vehicle, to protect the police from spurious claims, and to ensure police safety.

Petitioner insists that police may constitutionally breach the security of a locked suitcase to protect its contents. Thus, police may actually damage personal property to satisfy the *Opperman* justifications. If police feel that a suitcase contains valuables or weapons, Petitioner contends that *Opperman* permits opening the case, even if it is locked.

Permitting police to breach locked suitcases is the antithesis of protecting an owner's property. Prying open a locked suitcase may render the case useless as a repository for personal effects. Owners of locked suitcases which are returned unlocked or with broken latch mechanisms will be suspicious. A natural response by such property owners will be to carefully inspect the contents of the broken container to ensure nothing is missing. Since law enforcement agencies have problems with spurious claims of lost property, some property owners are predisposed to make false claims. Assuming the problem is genuine, those predisposed to levy false claims will be joined by a legitimately suspicious group of property owners with breached containers.

In *Cooper v. California*, 386 U.S. 58 (1967), this Court held that police may search a vehicle for their own protection if the vehicle must be retained by police. *Id.* 386 U.S. at 61-62. In *Opperman*, the Court adopted this reasoning as a component of the inventory search rationale. *Opperman*, 428 U.S. at 369. The joint appendix fails to reveal evidence that Trooper Adams justifiedly pryed open the suitcase to protect himself. The decision to pry open the case was premised on the belief that it posed no latent danger. Adams characterized Respondent as cooperative and friendly. (JA. 35). The appendix contains no indicia that Adams pryed open the case for safety reasons. In fact, Adams' only apparent motive to open the locked case was to search for evidence of a crime. (JA. 141, 142, 145).

Trooper Adams conducted an unreasonable inventory search on the vehicle since the scope of the search extended beyond that allowed by the *Opperman* justifications. If Trooper Adams merely inventoried the suitcase as "one locked container used to carry personal effects", the *Opperman* needs are satisfied. Adams could have left the locked suitcase within the vehicle's trunk at K&S Automotive's locked, guarded facility. Property within the case is secure and preserving the integrity of a locked suitcase will serve to minimize claims of lost or stolen property. Nothing in the joint appendix suggests that Respondent or the suitcase posed any threat to Trooper Adams. Thus, the fourth amendment will not sustain prying open a locked suitcase based on an undifferentiated or putative concern for safety. Such an arbitrary invasion is precisely the type of conduct the fourth amendment guards against. *Camara*, 387 U.S. at 528.

Ultimately, Petitioner argues that law enforcement officers must have the discretion to determine the scope of an automobile inventory search to ensure the intrusion is constitutionally reasonable. (Brief at 14-15). Noting the variety of vehicles and property which police encounter under impoundment procedures, Petitioner urges, "The objective facts, as seen by the officer, must determine to a degree the scope of the search regardless of the specificity of the policy." (Brief at 15). The argument concludes, " . . . if in the light of the facts, a caretaking function has been performed, such as protecting the property, protecting the safety of the police or the public, or preventing claims, an inventory search should be upheld . . . " *Id.*

Opperman and its progeny permit the exercise of police discretion according to standard criteria if based on something other than suspicion of criminal activity. *Opperman* reiterated that standard procedures will ensure that the intrusion would be limited in scope to the extent necessary to satisfy the caretaking functions of inventory searches. *Opperman*, 428 U.S. at 374-375. The exigencies of the real world require that police be permitted to exercise their discretion to protect themselves and the public.

The exercise of discretion in conducting inventory searches must be reasonable. The intrusion is constitutional if it is the minimum necessary to satisfy the *Opperman* justifications. An individual's legitimate expectation of privacy may not be trampled by the unbridled exercise of discretion under the guise of inventory procedures.

Traditionally, this Court has drawn a distinction between automobiles and homes under the fourth amendment. *Opperman*, 428 U.S. 367. The Court noted in

Opperman that the expectation of privacy regarding one's automobile is significantly less than that relating to one's home. *Id.*

In *United States v. Chadwick*, 433 U.S. 1, the Court emphasized that a person's expectation of privacy in personal luggage is substantially greater than in an automobile. *Id.* 433 U.S. at 13. In *Arkansas v. Sanders*, 442 U.S. 753, the Court re-emphasized that an individual's expectation of privacy in luggage, a repository for personal effects, is not diminished merely because it is carried in an automobile. *Id.* 442 U.S. at 764.

Absent agency guidelines concerning closed containers, Trooper Adams' exercise of discretion to determine the scope of the inventory search exceeded constitutional bounds. The heightened expectation of privacy in personal luggage supports this conclusion. The fourth amendment does not countenance a warrantless intrusion of a locked container typically used to secure personal effects. The exercise of discretion under *Opperman* and its progeny must be constrained to ensure the search is limited to the extent necessary to satisfy government interests. Further, such discretion may not be exercised based on suspicion of evidence of criminal activity. *Bertine*, 479 U.S. at 375. Under *Bertine*, an inventory search used as a ruse to conduct an investigatory search constitutes bad faith and is unreasonable under the fourth amendment. *Id.* 479 U.S. at 374-376.

The Florida Highway Patrol's procedures vested officers conducting vehicle inventory searches with an unconstitutional quantum of discretion. In *Camara v. Municipal Court*, the Court emphasized that warrantless

searches are unreasonable except in certain carefully defined classes of cases. *Camara*, 387 U.S. at 528-529. Acting under the very general guidelines of the Florida Highway Patrol, Trooper Adams was free to open some containers and not others.[5] The scope of vehicle inventory searches should be the same in each case. The justification for allowing warrantless searches is that the presence of exigent circumstances or standardized criteria ensures one's fourth amendment rights are preserved. *Terry v. Ohio*, 392 U.S. 1, at 22. *Delaware v. Prouse*, 440 U.S. 648, at 654-655. *Cady v. Dombrowski*, 413 U.S. 433, at 443. *Carroll v. U.S.*, 267 U.S. 132. *South Dakota v. Opperman*, 428 U.S. 364.

The Court explained in *Johnson v. United States*, 333 U.S. 10 (1948), "When the right of privacy must reasonably yield to the right of search is, as a rule to be decided by a judicial officer, not by a policeman or government enforcement agent." *Id.* 333 U.S. at 14. Thus, the right to conduct inventory searches without the review of a detached, neutral magistrate, must be guided by clearly defined procedures. *Bertine*, 479 U.S. at 374. Searching officers must search each car in the same minimally intrusive fashion to preserve fourth amendment rights.

In *South Dakota v. Opperman* and *Colorado v. Bertine*, this Court outlined the government interests which justify automobile inventory searches. The reasonableness of an inventory search is based on balancing the level of intrusion versus the government interests advanced by the search. *Prouse*, 440 U.S. at 654. These interests form

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[5] *See supra* note 3.

the objective standard Petitioner urges the Court to follow. Since the scope of the search conducted by Trooper Adams surpassed the level of intrusion necessary to protect owners' property, to minimize false claims of lost or stolen property, and to protect police, the search was unreasonable. The fourth amendment will not sanction such an intrusion.

The joint appendix reveals that Trooper Adams conducted the inventory search seeking to discover evidence of a drug related crime. (JA. 141, 142, 145, 147). Following *Bertine's* reasoning, since Adams searched the automobile as a ruse to conduct an investigatory search, he acted unreasonably and thus violated Respondent's fourth amendment rights. *Bertine*, 479 U.S. at 374-376. Trooper Adams' actions evince bad faith and violate one of the fundamental tenets of vehicle inventory searches articulated in *Colorado v. Bertine*. *Id*. 479 U.S. at 374.

The Supreme Court of Florida correctly held that procedures for vehicle inventory searches may not be so general to permit inventory searches of different cars differently. The level of intrusion of inventory searches must be the same for all vehicles to satisfy fourth amendment principles. Vehicle inventory searches, as for all warrantless searches, must adhere to standardized criteria, proscribing a scope beyond that required to satisfy the government interests advanced by the search. *Prouse*, 440 U.S. at 654.

The principle of federalism ensures the states' right to experiment in matters of local concern.[6] *Webster v. Reproductive Health Services*, 109 S.Ct. 3040 (1989). Constitutional issues concerning the local exercise of police power and thus inventory procedures are included within this realm. The state supreme court properly reviewed the reasonableness of the Florida Highway Patrol's procedures implemented by Trooper Adams concerning vehicle inventory searches. Thus, the decision of the Supreme Court of Florida concerning the constitutionality of a vehicle inventory search should be affirmed.

C. THE SUPREME COURT OF FLORIDA PROPERLY HELD THAT INVENTORY SEARCH PROCEDURES MUST ADDRESS CLOSED CONTAINERS AND BE REASONABLE TO SATISFY THE FOURTH AMENDMENT PRINCIPLES OF *COLORADO V. BERTINE*.

As noted, the Florida Highway Patrol's manual lacks rules regarding closed containers found during inventory searches and guidelines for the scope of such a search. (JA. 288-294). After finding money and two marijuana cigarette butts, Trooper Adams chose to pry open a locked suitcase seeking evidence of a drug deal. (Brief at

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[6] For a survey of the states' diverse approaches when reviewing inventory searches and the opening of closed containers, *see State v. Knippers*, 535 So. 2d 403 (La.App. 3 Cir. 1988); *State v. Hall*, 745 S.W.2d 745 (Mo.App. 1987); *Jones v. State*, 370 S.E.2d 784 (Ga.App. 1988); *People v. Blasich*, 527 N.Y.S.2d 563 (A.D. 2 Dept. 1988); *Commonwealth v. Bishop*, 523 N.E.2d 779 (Mass. 1988).

8). Thus, the central issue is whether a law enforcement agent may constitutionally investigate by prying open a locked suitcase, absent agency guidelines, during a vehicle inventory search.

The Supreme Court of Florida properly answered the question in the negative guided by *Opperman* and *Bertine*. The Supreme Court of Florida accepted discretionary review of the instant case to assess the reasonableness of an inventory search conducted by a state law enforcement agent.

Petitioner argues that the Supreme Court of Florida is drafting local law enforcement policies and procedures. The holding in *State v. Wells*, 539 So.2d 464 (Fla. 1989), requires that some procedures exist concerning closed containers. *Id.* at 469. Under *Bertine*, inventory searches must be reasonable and be conducted according to standardized criteria. The Supreme Court of Florida reviewed police conduct in the absence of procedure. Once the Florida Highway Patrol drafts a procedure concerning closed containers, the Supreme Court of Florida may have the opportunity to review implementation on an ad hoc basis.

Petitioner strenuously urges that the Supreme Court of Florida's dictum which mandates that inventory searches adhere to a no discretion policy for closed containers is contrary to *Bertine*. (Brief at 17). Petitioner premised the argument on this Court's conclusion:

> [R]easonable police regulations relating to inventory procedures administered in good faith satisfy the fourth amendment, even though courts might as a matter of hindsight be able to devise equally reasonable rules requiring a different procedure. *Bertine*, 479 U.S. at 374, 107 S.Ct. at 742, 93 L.Ed.2d at 747. (Footnote omitted).

However, in the instant case, Trooper Adams searched the suitcase in the absence of agency guidelines. The Supreme Court of Florida reviewed police conduct against this Court's principles concerning vehicle inventory searches and concluded that a no discretion policy for closed containers is required.

The Supreme Court of Florida's holding is consistent with the policy of judicial deference to local law enforcement procedures suggested by *Bertine*. The essence of the holding is that closed containers may not be opened during inventory searches without agency guidelines. The Constitution requires that standardized criteria guide inventory searches, and the Supreme Court of Florida interprets this to mean "no discretion."

D. WHEN A VEHICLE INVENTORY SEARCH UNCOVERS PROBABLE CAUSE OF A CRIME, THE FOURTH AMENDMENT PRINCIPLES OF *UNITED STATES V. CHADWICK* AND *ARKANSAS V. SANDERS* PRECLUDE A WARRANTLESS INTRUSION OF LOCKED PERSONAL LUGGAGE SUSPECTED OF CONTAINING CONTRABAND.

Petitioner concludes the SUMMARY OF ARGUMENT by stating, "The objective facts present, the cash on the floor of the car and the marijuana cigarette butts in the ashtray, definitely lead to the reasonable conclusion that, as a result of a drug deal, either money or weapons were located in the suitcase." (Brief at 8). Thus, Petitioner

concedes the existence of probable cause to search the locked suitcase. Petitioner admits that Trooper Adams felt contraband from a drug deal would be found in the locked container. *Id.*

In *United States v. Chadwick*, 433 U.S. 1, this Court reviewed the question whether a search warrant is required before police may open a locked footlocker seized at the time of a suspect's arrest when there is probable cause to believe the footlocker contains contraband. *Id.* at 3. The Court held that in the absence of an exigency to support an immediate search, the Warrant Clause requires the review of a detached, neutral magistrate once the property to be searched is under the exclusive control of the police. *Id.* at 15. The Court emphasized that the expectations of privacy in personal luggage are substantially greater than in an automobile. *Id.* at 13.

The facts of the instant case are, from the perspective of reviewing the search conducted, apposite to the teachings of *Chadwick*. In *Chadwick*, police arrested respondents and assumed exclusive control of the footlocker suspected of containing contraband. *Id.* at 4. Having secured the container, and absent fear that it posed any threat to the agents, the Court held that probable cause alone would not sustain the warrantless search. *Id.* at 15. Citing *Johnson v. United States*, the Court stated,

> " . . . a judicial warrant has a significant role to play in that it provides the detached scrutiny of a neutral magistrate, which is a more reliable safeguard against improper searches than the hurried judgment of a law enforcement officer engaged in the often competitive enterprise of ferreting out crime." *Id.* at 9. (Citations omitted)

In the case at bar, Trooper Adams conducted the inventory search after the vehicle driven by Respondent

was impounded. From the instant Adams decided to impound the vehicle, the Florida Highway Patrol assumed dominion over the vehicle and its contents. No threat existed that Mr. Wells' would remove the contents of the suitcase. Adams offered no testimony suggesting the suitcase posed any danger to the search party. The fact that Adams directed that the case be pryed open suggests a lack of concern for latent danger. Thus, under the fourth amendment principles of *Chadwick*, without an exigency requiring an immediate search, and since Adams had probable cause to believe the suitcase contained contraband, a search warrant was required. When Adams had the suitcase pryed open, he violated Respondent's fourth amendment rights.

This Court's decision in *Arkansas v. Sanders* supports the conclusion that Trooper Adams unreasonably encroached upon protections afforded Respondent by the fourth amendment. In *Sanders*, the Court reviewed the question whether, in the absence of exigency, police must obtain a search warrant to search luggage taken from an automobile properly stopped and searched for contraband. *Sanders*, 442 U.S. 745. The Court held that once police detain a criminal suspect and secure his suitcase, judicial approval is required before the case is searched. *Id.* at 766. Unless delaying the search will endanger the police or cause a risk of losing evidence, the Court reasoned that prior judicial approval is required to preserve a suspect's constitutional rights. *Id.*

During the inventory search of the vehicle driven by Mr. Wells, Adams discovered what he felt was evidence of a drug deal. (Brief at 8). Adams' motive to investigate supplanted the customary caretaking functions of inventory searches. Adams intimated that the suitcase contained contraband from a drug deal. (JA. 141, 142, 145).

There being no indicia that delaying the search to seek judicial approval would create a risk of losing evidence or endangering Adams and his cohorts, the search of the suitcase violated Mr. Wells' constitutional rights. Under *Chadwick* and *Sanders*, a warrant is required to search a suitcase suspected of containing contraband in the absence of an exigency.[7]

CONCLUSION

For the reasons stated, the decision of the Supreme Court of Florida should be affirmed.

Respectfully submitted,

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[7] *See State v. Ailport*, 413 N.W.2d 140 (Minn.App. 1987), where an officer who conducted an inventory search and had probable cause to believe a locked bank bag contained contraband obtained a search warrant before opening the locked container.